IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1184

PEGGY J. CONNOR, et al.,
Petitioners,

vs.

J. P. COLEMAN, UNITED STATES CIRCUIT JUDGE, et al.,
Respondents.

ON MOTION FOR LEAVE TO FILE AND ON PETITION FOR A WRIT OF MANDAMUS

REPLY BRIEF FOR THE RESPONDENT-DEFENDANTS

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This brief is submitted by the Defendant State Officials in reply to the Brief for the United States filed in response to petitioners' Motion for Leave to File Petition for Writ of Mandamus and received by said officials on May 10, 1976.

SUMMARY OF RESPONSE

The United States has now joined with petitioners in their request to have this Court compel or otherwise instruct the District Court not to await the decision by this Court in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, No. 75-104, certiorari granted November 11, 1975 (hereinafter "*Williamsburgh*") before proceeding with the formulation and implemen-

tation of a permanent reapportionment plan to replace the court-ordered plan of 1975.

A. The United States Is Unable to Articulate Any Injury to Petitioners, Who Were Afforded Representation Reasonably Equivalent to Their Political Strength.

The legislative districts established by the District Court for the 1975 legislative elections which were held thereunder, afforded black citizens of the State of Mississippi representation reasonably equivalent to their political strength.[1] However, the District Court in formulating the plan did not gerrymander the legislative districts to *maximize* black voting strength wherever it could be found. The District Court was under this Court's mandate in *Connor* v. *Waller*, 421 U.S. 656 (1975) to require the conduct of the legislative elections for 1975 under a court-ordered plan that complied with this Court's decisions in *Mahan* v. *Howell*, 410 U.S. 315 (1973); *Connor* v. *Williams*, 404 U.S. 549 (1972); and *Chapman* v. *Meier*, 420 U.S. 1 (1975). In complying with the mandate, the District Court, in the face of imminent elections, formulated and implemented a reapportionment plan for the 1975 legislative elections only. There is no question that a permanent reapportionment plan for the 1979 legislative elections will be formulated by the District Court, absent or subject to approved legislative action. Further, the District Court has announced that, where required, special elections will be held. There is no injury.

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1. Under the 1975 court-ordered plan (Pet.App.46a), 62% of the members of the Mississippi House of Representatives and 51.9% of the members of the Mississippi Senate were elected from districts having a black population of 36% or more—the equivalent black population percentage of the state.

B. The Questions in United Jewish Organizations of Williamsburgh, Inc. v. Carey, No. 75-104 on Which Certiorari Was Granted Directly Relate to the Relief of Maximization of Minority Voting Strength Requested by Petitioners.

In the formulation of a permanent reapportionment plan, the United States and the private plaintiffs seek to have the District Court create, with the central objective of maximizing black voting strength wherever found, as many districts as possible with black population majorities of at least between 54% and 65% of the district population.[2] On November 11, 1975, this Court granted certiorari in *Williamsburgh*. Contrary to assertion of the United States (Brief, pp. 14-15), *Williamsburgh* has direct application to the case sub judice, for it likewise concerns the drawing of district lines, with a central and governing premise that a certain number of districts must have a predetermined nonwhite majority in order to ensure nonwhite control in these districts. See *United Jewish Organizations of Williamsburgh, Inc.* v. *Wilson*, 510 F.2d 512, 517-518, 526 (C.A.2).

The decisions of this Court in *East Carroll Parish School Board* v. *Marshall*, No. 73-861 (March 8, 1976)[3] and *Beer* v. *United States*, No. 73-1869 (March 30,

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2. Plaintiffs' expert testimony was that a black population majority "somewhere between 54% and 65%" was necessary for a district to have a realistic probability of electing black candidates. (Transcript of Hearing, May 7, 1975; pp. 173-174 and 195—Dr. Gordon G. Henderson).

3. In *East Carroll Parish School Board* v. *Marshall*, No. 73-861, certiorari granted, 422 U.S. 1055, this Court affirmed the judgment below but expressly "without approval of the constitutional views expressed by the Court of Appeals," i.e., that multimember districts were unconstitutional unless their use would afford a minority greater opportunity for political participation, or unless the use of singlemember districts would infringe protected rights.

1976)[4] have provided the District Court with guidance toward the resolution of the alleged claims of racial dilution and the request for remedial relief. However, it is the striking similarity of *Williamsburgh* to the District Court's task that warrants the temporary delay ordered by the District Court.

ARGUMENT

The District Court Should Have the Benefit of the Decision of This Court in Williamsburgh Before Entering a Final Reapportionment Plan and Ordering Any Necessary Special Elections.

In *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, No. 75-104 (hereinafter "*Williamsburgh*"), certiorari was granted to review the decision of the United States Court of Appeals for the Second Circuit on the question of whether the Fourteenth and Fifteenth Amendments of the United States Constitution were violated by an alleged deliberate racial gerrymander under which election lines were drawn on the basis of a racial standard to secure a certain number of districts with substantial nonwhite majorities in order to ensure nonwhite control in those districts. In granting certiorari in *Williamsburgh*, at least four Justices of this Court determined that there were special and important reasons for the Court to decide the questions presented. The assertion by the United States (Brief, p. 19) that there is a "lack of any reason to believe that the decision in *Williamsburgh* will provide meaningful guidance here" misperceives the measurement of this Court's decision to grant certiorari in such cases.[5]

4. In *Beer* v. *United States*, No. 73-1869, probable jurisdiction noted, 419 U.S. 822, this Court rejected the Government's Section 5 definition of "dilution of minority voting strength," finding that same was not to be measured by the maximum potential impact of the minority vote.

In *Williamsburgh*, the State of New York, in view of the population changes reflected in the 1970 census, altered the state legislative districts in January of 1972, including the Senate and Assembly lines for Kings County, New York. The population of Kings County is 64.9% white and 35.7% nonwhite, and the county is divided into 22 assembly districts and 10 senate districts. In 1974, to comply with the criteria of the Department of Justice that there be three (3) senate districts and two (2) assembly districts with "substantial nonwhite majorities," the State drew new lines for Kings County, which was one of three New York Counties subject to the preclearance requirements of Section 5 of the Voting Rights Act of 1965 (as amended), 42 U.S.C. §1973c.

In establishing the new district lines for the county, the New York state officials "got the feeling that a 65% nonwhite majority would be approved"[6] since the Department of Justice had indicated that the 61.5% nonwhite population in a certain assembly district under the 1972 plan was insufficient. Therefore, the State, by its 1974 plan[7] created five (5) assembly districts having over 75% nonwhite populations and two

5. Rule 19 of the Revised Rules of the Supreme Court of the United States indicates the character of the reasons which will be considered by this Court in granting certiorari.

6. *Williamsburgh*, 510 F.2d 512, 517, reported testimony of Richard S. Scholaro, Executive Director of the Joint Committee on Reapportionment.

7. Laws of New York (1974), Chs. 588, 589, 590, 591 and 597.

(2) assembly districts with over 65% nonwhite populations as well as three senate districts with substantial nonwhite population majorities.[8] As articulated in the dissent:

> "The case concerns the drawing of district lines with a central and governing premise that a set number of districts must have a predetermined nonwhite majority of 65% or more in order to ensure nonwhite control in those districts." *Williamsburgh*, 510 F.2d 512, 523.

We agree. The paramount question thus presented is whether a district court can approve the implementation of a plan fashioned with such a purpose to achieve a similar result.

The objective of the reapportionment plans proposed by the private plaintiffs[9] and the United States,[10] quite clearly, is to maximize black voting strength wherever it may be found but still not to waste it. In the Kirksey Plan, plaintiffs deliberately created twenty-six (26) house districts with black population majorities in excess of 57% to achieve a black voting-age majority in those districts, and, with the same

8. *Williamsburgh*, 510 F.2d 512, 518 and 523. Under the 1972 plan, six of the twenty-two assembly districts had over 60% nonwhite populations and one over 50%. The 1972 senate plan had only one district out of the ten senate districts of the county with a substantial nonwhite population majority.

9. The Valinsky and Kirksey plans were submitted to the District Court by plaintiffs as plaintiffs' Exhibits Nos. 19 and 20 and 33 and 34; and additionally, have been offered repeatedly as attachments or appendices to plaintiffs' pleadings.

10. The State Modified Plan drawn by the Department of Justice carves out twenty-nine house districts and eleven senate districts with black voting-age population majorities (Pet.App.15a).

purpose, carved out seven (7) senate districts with black population majorities exceeding 57.8%. Similar results are achieved by the private plaintiffs and the United States in all the reapportionment plans submitted to the Court. Without question, the relief that plaintiffs and the United States seek is the deliberate creation of legislative districts with substantial black population majorities, resulting in black voting-age population majorities with sufficient margin to assure nonwhite control in those districts. No harm to plaintiffs or the United States can result from awaiting this Court's decision in *Williamsburgh* on whether a district court can constitutionally fashion or approve a plan deliberately drawn on the basis of such a racial standard.

The United States argues (Brief, p. 14) that in balancing the equities:

> "[T]he irreparable injury the state's voters will suffer by further delay in the implementation of a lawfully adequate reapportionment plan far outweighs anything that might be gained by waiting for the decision in *Williamsburgh*."

The fallacy of the Government's argument here is at least twofold. First, no injury has been shown, especially where under the 1975 court-ordered plan fourteen (14) senators (26%) were elected from districts having black population majorities and thirty (30) representatives (25%) were elected from districts having black population majorities. Moreover, under the 1975 court-ordered plan an additional thirteen (13) senators and forty-six (46) representatives were elected from districts having black populations between 36%

and 50%.[11] Second, assuming arguendo that this Court does not reach the question in *Williamsburgh* involved here, if any special elections are required as a consequence of any changes made in the existing districts by the permanent reapportionment plan, then they can be conducted at such time. *Town of Sorrento* v. *Reine*, No. 75-93, decided April 26, 1976; *Hadnott* v. *Amos*, 394 U.S. 358; *Keller* v. *Gilliam*, 454 F.2d 55 (C.A.5); *Toney* v. *White*, 488 F.2d 310 (C.A.5) (en banc); *Hall* v. *Issaquena County*, 453 F.2d 404 (C.A.5); *Hamer* v. *Campbell*, 358 F.2d 215 (C.A.5), certiorari denied, 385 U.S. 851.

The United States attempts to explain its failure or reason for not appealing from the District Court's order establishing a reapportionment plan for the 1975 legislative elections on three grounds (Brief, p. 8): "the proximity of the August 12 primary elections, the district court's indication that it intended to take prompt action in formulation of a final plan and scheduling special elections, if necessary, and this Court's prior indication, in *Connor* v. *Williams*, supra, that it wished to rule only on a final plan. . . ."

The Government concedes, however, that the District Court declined to establish a deadline for approval of a final plan. Prior to the conduct of the 1975 elections, the United States and the private plaintiffs were clearly and frankly advised by the District Court that it could not impose a deadline on its own efforts.

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11. See District Court order of July 11, 1975 (Pet.App.46a) implementing the reapportionment plan for the 1975 elections. Additionally, seventy-six of the present house members and twenty-seven of the present senate members were elected from districts having a black population of 36% or more—the equivalent black population percentage of the state.

It is now quite apparent that prior to the 1975 legislative elections the United States and the private plaintiffs disapproved of the legislative districts as established by the District Court's order of July 11, 1975. Their disappointment with the results of the 1975 legislative elections has magnified their earlier disapproval, to the extent that now they seek appellate review of the 1975 plan by this extraordinary means. To seek summary review of the District Court's reapportionment plan implemented by its order of July 11, 1975, after they remained silent and took no action and watched the State of Mississippi three times call its citizens to the polls, flies squarely in the face of the equitable principles the United States seeks to invoke.

While the United States offers this Court (Brief, p. 19) a less rebuking solution to the alleged problem presented by petitioners, i.e., "denial of the writ with an explanation that the district court is expected to perform its duty forthwith. . . .", the result they seek is the same, for they urge that: "[e]ither by that means or by issuance of the writ, the district court should be instructed to proceed to a prompt decision and decree ordering special elections."

With the absence of any finding that plaintiffs have suffered injury as a result of the 1975 legislative elections and with the issue of maximization of minority voting strength clearly present here as in *Williamsburgh*, the result sought by the motion and petition for writ of mandamus is not warranted.

CONCLUSION

For the reasons stated, the Motion for Leave to File Petition for Writ of Mandamus should not be granted. The District Court should be allowed to defer

the formulation of a permanent reapportionment plan until this Court decides *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, No. 75-104.

Respectfully submitted,

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CERTIFICATE

I, A. F. SUMMER, Attorney General of the State of Mississippi, do hereby certify that I have mailed this date by United States Mail a true copy of the foregoing Reply Brief for the Respondent-Defendants to the following:

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THIS the 13th day of May, 1976.

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